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In The

Supreme Court of the United States

October Term, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Masakazu Yamaguchi, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Makoto Okai and Yooko Okai, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

While this appeal was pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) which arose out of the same air carrier disaster as the instant appeal. *Zicherman* held that the types of recoverable damages in an action governed by the Warsaw Convention* must be determined by reference to domestic law and, where a death occurs on the high seas, DOHSA** applies as the measure of the wrongful death remedy, which disallows loss of society damages.

Also while this appeal was pending in the court below, the Court decided *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996) which held that state law remedies may be applied to supplement general maritime law under *Moragne**** for deaths that occur in territorial waters and assumed without deciding that *Moragne* encompasses a survival cause of action. Thus, the Court inherently identified the distinction between wrongful death action remedies and survival action remedies.

In this action, the court below disallowed nonpecuniary damages for the decedents' predeath pain and suffering under DOHSA on the basis of the Courts' *Zicherman* decision but did not distinguish between the general

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* Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

** Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988), 46 U.S.C. App. 761 *et seq.* (1988).

*** *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

QUESTIONS PRESENTED FOR REVIEW – Contined

maritime law survival action remedies on the one hand and wrongful death remedies under DOHSA on the other. It decided the substantive issue of the legal availability of a claim for predeath pain and suffering notwithstanding the fact that KAL had not raised the issue in its initial briefs. And it disallowed damages for survivors' grief under 46 U.S.C. App. § 764.

The questions presented for review are:

1. Does the general maritime law of the United States recognize a survival cause of action for predeath pain and suffering? If yes, may it be brought simultaneously with a separate wrongful death cause of action governed by the Death on the High Seas Act?

2. Are §§ 761/62 and § 764 of the Death on the High Seas Act cumulative where the vessel is a foreign flagship such that, if the law of the flag of the vessel permits a recovery for the decedent's predeath pain and suffering and for beneficiaries' mental anguish and grief as a wrongful death recovery, the same may be recovered in American courts?

3. Should the Ninth Circuit's review of the legal availability of the general maritime law survival action have been barred by the doctrine of issue preclusion?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONER

Petitioner Kimberly S. Saavedra, as Personal Representative of the Estates of Masakazu Yamaguchi, Makoto Okai, and Yooko Okai, respectively, is an individual.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kimberly S. Saavedra, as Special Administrator of the Estates of Makoto Okai, deceased; Yooko Okai, deceased; and Masakazu Yamaguchi, deceased, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals of the Ninth Circuit entered on August 2, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 93 F.3d 547 (9th Cir. 1996). It is also reproduced in the Appendix to this Petition at A1a-22a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1996 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on September 9, 1996. A23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Court of first instance was pursuant to 28 U.S.C. § 1331, Federal Question Jurisdiction, and 28 U.S.C. § 1332, Diversity of Citizenship Jurisdiction.

PROVISIONS OF LAW INVOLVED

This case arises under the Warsaw Convention, formally known as The Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 note. Because the locus of the deaths was on the high seas, the survival cause of action is governed by general maritime law and the wrongful death cause of action is governed by the Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988 ed.), 46 U.S.C. App. § 761 *et seq.* 1988.

STATEMENT OF THE CASE

Petitioner is the Personal Representative of the estates of three passengers who were killed when Korean Air Lines Flight 007 was shot down over the Sea of Japan on September 1, 1983. *See generally, Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). Following the resolution of liability issues, the within cases were remanded to the Central District of California for damages trials against Korean Air Lines Co., Ltd. ("KAL"). The *Saavedra/Yamaguchi* case was tried to a jury and judgment was entered on October 20, 1993. The *Saavedra/Okai* cases, which were consolidated actions brought on behalf of husband and wife decedents, were tried before another jury, and judgment was entered on February 4, 1994.

In the *Saavedra/Okai* cases, the jury awarded wrongful death damages to the individual beneficiaries in the total following amounts:

Loss of support – $200,000

Mental anguish and grief – $150,000

Loss of society – $300,000

Funeral expenses – $29,583

The jury also awarded survival action damages to the personal representative of each estate in the amount of $750,000 per decedent.

In the *Saavedra/Yamaguchi* case, the jury awarded wrongful death damages to the individual beneficiaries in the total following amounts:

Loss of support – $1,813,391

Loss of services – $114,570

Mental anguish and grief – $526,000

Funeral expenses – $16,500

The jury also awarded survival action damages to the personal representative of the estate of Masakazu Yamaguchi in the amount of $100,000.

The District Courts then computed prejudgment interest on the respective amounts and entered final judgment.

Korean Air Lines appealed the *Saavedra/Okai* verdicts to the court below on the grounds that the District Court erred (1) in permitting the jury to assess loss of society damages; (2) in allowing damages for the survivors' grief; (3) that the verdicts for the decedents predeath pain and suffering were not supported by sufficient evidence and were excessive; and, (4) that the awards for loss of support to the decedents' parents were not supported by

substantial evidence. KAL did not appeal the legal availability of the survival action claim for predeath pain and suffering.

Plaintiff *Saavedra/Okai* appealed the failure of the District Court to enter the verdicts for loss of society damages and the application of the prejudgment interest rate.

Korean Air Lines appealed the *Saavedra/Yamaguchi* verdict to the court below on the grounds that: (1) the District Court erred when it allowed damages for the survivors' grief; (2) that the awards for the survivors' grief were not supported by sufficient evidence and were excessive; and, (3) that the verdict for predeath pain and suffering was not supported by sufficient evidence. KAL did not appeal the legal availability of the survival action claim for predeath pain and suffering.

Plaintiff *Saavedra/Yamaguchi* cross-appealed on the grounds that the District Court erred when it denied the right to assert loss of society damages and on its application of the prejudgment interest rate.

The appeals were still pending in the Ninth Circuit when this Court entered its decision in *Zicherman*, which involved claims also arising from the KAL Flight 007 catastrophe but which only addressed the issue of the legal availability of loss of society damages in a Warsaw-governed case which had its wrongful death remedy created by the Death on the High Seas Act. KAL requested permission of the Ninth Circuit to file a supplemental brief. The Ninth Circuit permitted all parties to file supplemental briefs limited to the effect of the *Zicherman* decision on the pending appeals.

The Ninth Circuit reversed the District Court's award of survival action damages for decedents' predeath pain and suffering and reversed the District Court's award of damages for the survivors' mental anguish and grief.[1]

In its decision, the lower court cited *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g*, ___ F.3d ___, 1996 WL 490375 (6th Cir. Aug. 29, 1996), a Sixth Circuit decision addressing identical issues which originally held that survival action damages were not cognizable. However, on August 29, 1996, the Sixth Circuit reversed itself in an amended opinion not cited by the court below and held that KAL had waived its right to appeal the issue because it had initially failed to challenge the propriety of the award in its briefs. *Id. amended decision Aug. 29, 1996*. Similarly, the D.C. Circuit refused to address the issue of the legal availability of survival action damages on the grounds that KAL had failed to raise it initially. *Forman v. Korean Air Lines*, 84 F.3d 446, 448-49 (D.C. Cir. 1996), Petition for Writ of Certiorari filed October 3, 1996, Docket No. 96-530.

Saavedra, the personal representative of the estates of Masakazu Yamaguchi, Makoto Okai, and Yooko Okai, in her capacity as Personal Representative of the estates and in her fiduciary capacity on behalf of the individual beneficiaries now petitions this Court for a writ of certiorari.

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[1] It also eliminated damages for loss of society per *Zicherman*, affirmed loss of support damages, and affirmed a prejudgment interest award.

REASONS FOR GRANTING THE PETITION

There are five compelling grounds for this court to grant certiorari and review the decision below.

1. A conflict now exists among circuit courts as to whether a general maritime law survival cause of action for a decedent's predeath pain and suffering exists and, if so, if it may co-exist with a wrongful death cause of action under the Death on the High Seas Act. As this court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990), several Courts of Appeal have identified that there is a general maritime right of survival. And in *Yamaha Motor Corp v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996), this Court assumed without deciding that a general maritime law survival cause of action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), citing *Miles, supra*. Given that this Court has never directly addressed the issue, the Courts of Appeals for the First, Fifth and Eighth Circuits have taken guidance from the Court's inferences in *Miles* and *Moragne* and identified a general maritime survival action. The Ninth Circuit stands alone in its rejection of the survival cause of action as against each of its sister circuits which have addressed the issue. The Ninth Circuit's decision, unlike those of the other Circuits, ignores the distinction between the survival cause of action and the wrongful death cause of action, which this Court has itself specifically identified. *Sea-Land Service, Inc. v. Gaudet*, 414 U.S. 573, 575-76, n.2 (1974).

2. The decision below misapplied this Court's opinions in *Mobile Oil Corp v. Higginbotham*, 436 U.S. 618 (1978) and *Zicherman*, each of which addressed only

wrongful death remedies, by focusing solely on DOHSA's limitations on nonpecuniary damages to the improper exclusion of the separate survival cause of action. The misinterpretation will cause significant confusion among the lower courts unless clarified by this Court.

3. There is a conflict at the district court level that interprets §§ 761/62 and § 764 of the Death on the High Seas Act. Some district courts have permitted claims brought under foreign law where the flag of the vessel is foreign to be supplemented with claims brought under United States statutes. Other district courts require a choice of either foreign law or American law. No circuit court has addressed the issue. Given the dearth of decisions, this Court should clarify these issues, particularly given the *Zicherman* decision applying DOHSA in Warsaw Convention cases and the greater likelihood of § 764 being applied to air accidents involving foreign carriers.

4. KAL should be barred from challenging the issue of the legal availability of a survival action by the doctrine of "issue preclusion." KAL did not initially raise the issue on appeal and the result places Petitioner in a dramatically opposite position as others whose cases were appealed to the Sixth and District of Columbia Circuits. In other actions arising out of the same KAL Flight 007 catastrophe, the Sixth Circuit in *Bickel, supra,* and the District of Columbia Circuit in *Forman, supra,* have affirmed the decedents' estates' recoveries for predeath pain and suffering under identical facts and state of the law as faced the Ninth Circuit. Justice is not served by barring these claims in the Ninth Circuit while permitting them under *identical* circumstances in the Sixth and District of Columbia Circuits.

5. There are still 25 cases pending in the District and Circuit Courts arising from the KAL disaster that would benefit from this Court's answer to the issues raised. Moreover, the Death on the High Seas Act may arguably be applied to claims arising from the TWA Flight 800 disaster which occurred off the coast of New York on July 17, 1996 in which 230 persons perished. That flight was also governed by the Warsaw Convention. Potentially 230 wrongful death and survival claims may be brought in United States courts. The issues raised are not isolated to scarce cases. This Court should provide definitive guidance on the elements of damage to prevent conflicting and inconsistent results.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE CIRCUITS WHETHER A GENERAL MARITIME LAW SURVIVAL ACTION EXISTS AND WHETHER IT MAY BE JOINED WITH A WRONGFUL DEATH ACTION UNDER DOHSA

Certiorari should be granted to determine that a general maritime survival cause of action exists under an analysis akin to that in *Moragne*, which identified a general maritime law wrongful death cause of action. The traditional maritime rule disallowing a survival right has been changed by the widespread acceptance of a survival cause of action for predeath pain and suffering. *See,*

Yamaha Motor Corp., supra, 116 S. Ct. at 625 n.7 (1996) (" . . . we assume without deciding that *Moragne* also provides a survival action.")

Once the Court identifies that a survival right exists, it should resolve the conflict in the Circuits created by the court below and state that the survival action may co-exist with a DOHSA death action and that DOHSA limitations on nonpecuniary damages do not abrogate survival action remedies.

The Ninth Circuit's denial of a general maritime law survival cause of action where the wrongful death cause of action arises under DOHSA contravenes decisions exactly to the contrary in the First Circuit, *Barbe v. Drummond,* 507 F.2d 794, 799-800 (1st Cir. 1974), and the Fifth Circuit, *Azzopardi v. Ocean Drilling and Exploration Co.,* 742 F.2d 890, 893 (5th Cir. 1984), *Law v. Sea Drilling Co.,* 523 F.2d 793, 794-95 (5th Cir. 1975) each of which dealt with a survival action in the context of the death action arising under DOHSA.[2] The Ninth Circuit decision also contravenes the logic and legal analysis of the Eighth Circuit, which permitted a general maritime survival action to be joined with a *Moragne* general maritime death action. *See,*

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[2] Several district courts have also found a general maritime law survival cause of action which may be brought simultaneously with a DOHSA death action; *Gray v. Lockheed Aeronautical Systems Co.,* 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co., Inc.,* 856 F. Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States,* 466 F. Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.,* 573 F. Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate,* 687 F. Supp. 475, 479 (N.D. Cal. 1987); *McAleer v. Smith,* 791 F. Supp. 923 (D.R.I. 1992).

Spiller v. Thomas M. Lowe, Jr. Assoc., Inc., 466 F.2d 903, 909 (8th Cir. 1972). Moreover, the court below had previously joined the other circuits in their unanimous acknowledgment of the survival cause of action and had to reverse its own precedent with its *Saavedra* opinion. *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987)

By its *Saavedra* decision, the Ninth Circuit places itself apart and singularly alone from its sister circuits.

II.

CERTIORARI SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S MISAPPLICATIONS OF THIS COURT'S DECISION IN *MOBIL OIL CORP., MILES,* AND *ZICHERMAN*

The rationale that the Ninth Circuit used to substantiate its decision shows a fundamental misperception of this Court's decisions in *Mobil Oil Corp.* and *Zicherman*. Each of those decisions related to whether a particular type of *wrongful death* element of damage was available in a DOHSA wrongful death action, e.g., loss of society. Here, the type of damage at issue, i.e., the recovery for the decedent's pain and suffering, is peculiarly a survival action remedy, not a wrongful death remedy. The Court below glossed over the distinction between wrongful death actions and survival actions by stating that this Court in *Zicherman* gave "no indication that there was any material difference between loss of society damages and any other non-pecuniary damages, all of which DOHSA expressly disallows." A19a. It ignored that

plaintiffs asserted the right to predeath pain and suffering damages under general maritime law, *not* under DOHSA.

The Ninth Circuit also misapprehends this Court's decision in *Miles, supra*. The *Saavedra* Court read *Miles* as disallowing a survival claim but without limiting the holding to only barring a claim for lost future wages, and without noting the grounds for the denial used by this Court, i.e., that a claim for lost future wages had not found widespread acceptance in the states and federal analogues. The *Miles* Court did note, however, that several Circuits had identified a general maritime survival action and cited Circuit decisions that had found the right included claims for predeath pain and suffering, which *had* been widely adopted and accepted. 498 U.S. at 34. Indeed, the *Miles* Court had been asked to do what petitioner now requests and to specifically acknowledge a general maritime survival action. *Miles* declined to do so only because it was unnecessary to the narrow issue presented there. *Id.* Certiorari should be granted to answer this important question that has been pending unanswered since *Miles*.

Lastly, the *Saavedra* Court misapprehends the Court's recent decision in *Zicherman*. The *Zicherman* court addressed typical wrongful death damages. In this case, petitioner is not seeking to "supplement" statutory wrongful death damages. Rather, she is seeking acknowledgment of the propriety of asserting a distinct survival cause of action remedy with whatever damages are permissible under the death cause of action.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE CONFLICT IN THE DISTRICT COURTS' INTERPRETATIONS OF 46 U.S.C. APP. §§ 761/62 AND § 764

The Death on the High Seas Act was enacted in 1920. In the more than 75 years of its existence, no appellate level court has addressed the interplay between §§ 761/62 and § 764 of DOHSA. Sections 761/62 generally give the personal representative of a decedent killed on the high seas the right to bring an action in the district courts sitting in admiralty. Section 764 addresses rights of action given by laws of foreign countries and authorize such actions in the district courts sitting in admiralty "without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary is notwithstanding."

There are two lines of authority addressing this issue at the district court level. Some district courts have permitted claims under foreign law to be cumulative with claims brought under American statutes where the vessel is of a foreign flag. *See, e.g., Powers v. Cunard S.S. Co.*, 32 F. Supp. 720 (S.D.N.Y. 1925); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002 (S.D.N.Y. 1966); *Heath v. American Sail Training Assoc.*, 644 F. Supp. 1459 (D.R.I. 1986). Other courts have treated § 764 as a choice of law provision that requires that either foreign law or American law be applied. *Bergeron v. Koninklijke Luchtonart Maatschappij, N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2nd Cir. 1962); *In re Korean Air Lines Disaster of September 1, 1983*, 814 F. Supp 592 (E.D. Mich. 1992); *In re*

Air Crash Disaster New Bombay, India on January 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982).

In *Zicherman*, this Court noted Article 17 of the Warsaw Convention was a pass-through that dictated a traditional choice of law analysis. *Zicherman, supra*, 116 S. Ct. at 636. If that analysis resulted in application of American law and the death occurred on the high seas, DOHSA would govern wrongful death issues. Thus, *Zicherman* changed the state of the law with regard to wrongful death damages as previously the courts had universally held that Article 17 of the treaty created its own cause of action with "damages sustained" being the appropriate measure of damages, further defined by reference to common law. *See, e.g., Zicherman; In re Air Disaster at Locherbie, Scotland on December 21, 1988*, 928 F.2d 1267, *cert. denied sub. nom., Rein v. Pan American World Airway, Inc.*, 502 U.S. 920 (1991); *In re Air Disaster at Locherbie, Scotland on December 21, 1988*, 37 F.3d 804 (C.A.2. 1994), *cert. denied sub. nom., Pan American Airways, Inc. v. Pagnucco*, 115 S. Ct. 934 (1995); *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub. nom., Bickel; In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2. 1986, Ospina v. TWA*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993).

For many Warsaw flights, DOHSA may be the applicable wrongful death statute. Given the increase in international flights to and from the United States by foreign air carriers, many of them transversing either the Atlantic or Pacific Oceans, the potential for application of § 764 is greatly magnified. Since there is a dearth of cases at the

appellate level, clarification by this Court could prevent contentious, lengthy, and expensive future litigation.

IV.

CERTIORARI SHOULD BE GRANTED TO BAR KAL'S BELATED APPEAL BY THE DOCTRINE OF ISSUE PRECLUSION

KAL appealed the within actions to the Ninth Circuit at the same time appealing verdicts arising from the Flight 007 catastrophe to the Sixth Circuit (*see, Bickel*) and the District of Columbia Circuit. (*see, Forman*). When this Court granted certiorari in *Zicherman,* each Circuit stayed proceedings until the Court entered its decision, at which time supplemental briefings were permitted.

KAL failed to raise the issue of the legal availability of a survival action claim for predeath pain and suffering in its briefs in any of the Circuits. The District of Columbia Circuit refused to address the issue, treating it as waived. *Forman,* 84 F.3d at 448. In an Amended Order, the Sixth Circuit declined to address the issue, also on the grounds that it had not been raised in the opening briefs and because *Zicherman* had not changed settled law. *Bickel,* 83 F.3d at *4.

Petitioner is in an identical posture as were the estate representatives in *Forman* and *Bickel.* Fairness dictates that she be treated equally by barring KAL from raising the issue under the doctrine of issue preclusion. Restatement (Second) Judgments, § 27.

V.

NUMEROUS CASES ARISING OUT OF AIR DISASTERS AWAIT A DEFINITIVE RULING ON RECOVERABLE DAMAGES IN SIMILAR CIRCUMSTANCES

There are currently 25 pending cases in the District and Circuit Courts arising from the KAL catastrophe yet these 16 years after its occurrence. Of those, four are pending in the District of Columbia Circuit on interlocutory appeal pursuant to 28 U.S.C. § 1292(a) addressing exactly the same issues presented in this Petition for Certiorari. Unless this Court grants the writ, the risk of inconsistent treatment of similarly situated plaintiffs is great.

Moreover, it should be noted that it may be argued that DOHSA and general maritime law apply to claims arising from the TWA Flight 800 catastrophe that resulted in the deaths of all 230 on board off the coast of New York on July 17, 1996. The existence and breadth of a general maritime law survival action will undoubtedly be raised in those cases. The sheer numbers of cases which the Court's decision would affect indicates the importance of the issues. These cases also await definitive guidance from the Court on the parameters of recovery under general maritime law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted in all respects.

Dated: October 17, 1996

Respectfully submitted,

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FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY S. SAAVEDRA; THE ESTATE of MASAKAZU YAMAGUCHI; MAKIKO YAMAGUCHI; CHISATO YAMAGUCHI, et al., Plaintiffs-Appellees/ Cross-Appellants, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellant/ Cross-Appellee.	Nos. 94-55018 94-55060 94-55161 DC NO. CV-84-09324-IH(JRx)

Appeals from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

KIMBERLY S. SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Personal Representative of TORU OKAI and HITOKO OKAI, Plaintiff-Appellant/ Cross-Appellee, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellee/ Cross-Appellant.	Nos. 94-55495 94-55496 CV-84-09329-AWT OPINION

Appeals from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
April 8, 1996 – Pasadena, California

Filed August 2, 1996

Before: Mary M. Schroeder and Edward Leavy, Circuit Judges, and James T. Trimble, Jr.,* District Judge.

Opinion by Judge Schroeder

SUMMARY

Torts/Admiralty and Marine/Aviation

The court of appeals vacated in part a district court order and affirmed in part. The court held that in a damages action arising out of the downing of a Korean Air Lines flight, any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors and the pre-death pain and suffering of the victims, were effectively foreclosed by Supreme Court reasoning.

In 1983, missiles shot down one of appellant Korean Air Lines Company, Ltd.'s (KAL's) flights over the Sea of Japan. KAL's liability to all of the passengers on the flight was established in a single trial conducted in the District Court for the District of Columbia. The jury found that

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* Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

KAL's "willful misconduct" caused the passengers' death, and the court of appeals affirmed that finding.

Appellee Kimberly Saavedra is the personal representative for the estates of three crash victims, Makoto and Yoko Okai and Masakazu Yamaguchi. Saavedra sued KAL in the District Court for the Central District of California, claiming a wide array of damages. Judge Irving Hill issued pretrial rulings and went on to preside over the jury trial of the Yamaguchi action. Judge A. Wallace Tashima presided over the jury trial of the Okai actions. In all of the cases, Saavedra proceeded under the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) and the Death on the High Seas Act (DOHSA). Under an order issued by Judge Hill, damages for loss of society were disallowed. Judge Tashima did not enter judgment on a jury finding of loss of society damages. The Okai and Yamaguchi juries awarded verdicts on other damages, including survivor's grief, pre-death pain and suffering of passengers, and loss of support. Both judges awarded prejudgment interest to Saavedra at the rate of the 52-week Treasury Bill (T-Bill) as of the last T-Bill auction prior to the judgment.

In both the Okai and Yamaguchi actions, the parties filed appeals and cross-appeals. In a related Supreme Court case, *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), the Court invalidated an award for loss of society, holding that DOHSA does not authorize non-pecuniary damages.

[1] The Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society,

effectively foreclosed any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors and the pre-death pain and suffering of the victims.

[2] Like the plaintiffs in *Zicherman*, Saavedra claimed loss of society damages directly under the Warsaw Convention. [3] In *Zicherman*, the Court rejected the district court's theory that damages were recoverable directly under the Warsaw Convention, determining that courts are to determine what harm is "legally cognizable" only by referring to domestic law. [4] The Court then rejected the court of appeals' holding that general maritime law was the proper domestic law to consider. The Court reasoned that federal courts are authorized only "to apply the law that would govern in the absence of the Warsaw Convention," and in cases of wrongful death on the high seas, that law is DOHSA. The Court concluded that because DOHSA permits only pecuniary damages, loss of society damages are unavailable. [5] The rule in *Zicherman* had to be given retroactive effect in this case, which was pending when *Zicherman* was decided. Therefore, the district court judgments, insofar as they denied damages for loss of society, had to be affirmed.

[6] The district court allowed the jury to award damages in each case for survivor's grief on the ground that such damages were available directly under the Warsaw Convention. In light of *Zicherman*, however, the district court's theory was no longer tenable. The Court explained that no cause of action directly under the Warsaw Convention existed; the Convention merely provides "pass through" provisions that allow courts to use only domestic causes of action. Saavedra was limited to the

remedies provided in DOHSA. DOHSA creates only a cause of action for pecuniary damages suffered by the estate, and survivor's grief is a nonpecuniary damage. [7] Although Saavedra contended that a DOHSA section entitled "Rights of action given by laws of foreign countries" allowed recovery for damages available under Korean law, [8] she failed to preserve the theory in the district court. No evidence of Korean law was adduced at trial, and the question of survivor's grief damages under a Korean law theory was not put to the jury.

[9] Just as survivor's grief and loss of society damages were unavailable directly under the Convention, the same was true for pain and suffering. The Convention does not create a substantive cause of action. Pain and suffering is nonpecuniary, and DOHSA allows recovery only for pecuniary harm. [10] Saavedra never advanced a Korean law theory in support of pre-death pain and suffering damages to the district court. [11] Saavedra contended that a decedent's estate could bring a survival claim for pre-death pain and suffering under general maritime law, even though that cause of action was unavailable under DOHSA. Although the Court previously held that KOHSA may be supplemented by general maritime law [12] and the Ninth Circuit previously held that DOHSA may be supplemented with a survival action under general maritime law, [13] several subsequent Court decisions, culminating with *Zicherman*, precluded such relief. [14] Because DOHSA does not allow recovery for nonpecuniary damages, Congress' remedy could not be "supplemented" to allow a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed in this case.

[15] Substantial evidence supported the jury's award of loss of support damages to the Okais' parents.

[16] In regard to prejudgment interest, Saavedar argued for a T-Bill rate just before the time of injury, while KAL argued for the T-Bill rate just before the time of judgment. Presented with those choices, the district court did not abuse its discretion.

COUNSEL

Juanita M. Madole, Speiser, Krause, Madole & Cook, Irvine, California, for the plaintiffs-appellees-cross-appellants.

Andrew J. Harakas, Tompkins, Harakas, Elsasser & Tompkins, White Plains, New York, for the defendant-appellant-cross-appellee.

OPINION

SCHROEDER, Circuit Judge:

These two sets of appeals and cross-appeals arise out of the Korean Air Lines ("KAL") disaster of September 1, 1983, when missiles fired from Soviet military aircraft shot down KAL Flight KE007 over the Sea of Japan. The plaintiff, Kimberly Saavedra, is the personal representative for the estates of three crash victims: Makoto and Yoko Okai, who were husband and wife, and Masakazu Yamaguchi. Saavedra filed these actions against KAL in the District Court for the Central District of California, claiming a wide array of damages.

When Saavedra filed suit, KAL's liability to all of the passengers on flight KE007 had already been established in a single trial, conducted in the District Court for the District of Columbia. *See In re Korean Air Lines Disaster of Sept. 1, 1983,* 575 F.Supp. 342, 343 (J.P.M.L. 1983)(per curiam). That trial followed from an order of the Judicial Panel on Multidistrict Litigation, which transferred all of the federal cases relating to the KEOO7 disaster to D.C. for resolution of the common issues. The jury in the consolidated trial found that KAL's "willful misconduct" had caused the death of the passengers, and awarded punitive damages. The Court of Appeals for the District of Columbia then vacated the award of punitive damages, but affirmed the finding of willful misconduct. *See In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475 (D.C. Cir.), *cert. denied,* 502 U.S. 994 (1991). Once the common liability issues were resolved, victims and their surviving relatives pursued actions for compensatory damages in various jurisdictions.

The cases before us were originally assigned to Judge Irving Hill of the Central District of California, who issued pretrial rulings and who went on to preside over the jury trial of the Yamaguchi action. Judge A. Wallace Tashima presided over the jury trial of the Okai actions. In all of the cases, Saavedra proceeded under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C.App. § 1502 note ("Warsaw Convention") and the Death on the High Seas Act, §§ 1 *et seq.*, 46 App.U.S.C.A. §§ 761 *et seq.* ("DOHSA"). Because the D.C. Circuit had upheld the jury's finding of willful misconduct, the $75,000 cap on

damages, contained in Article 25 of the Warsaw Convention, was lifted.

In a pretrial ruling that governed all of Saavedra's actions, Judge Hill specified the types of damages that were recoverable under DOHSA and the Warsaw Convention. Under Judge Hill's order, damages for loss of society were disallowed. Judge Tashima did submit instructions to the jury on the issue of loss of society, but in deference to Judge Hill's earlier ruling, did not enter judgment on the jury's finding of $300,000 loss of society damages. The Okai and Yamaguchi juries awarded the following verdicts on the other, permissible damages:

Kind of Damages	*Okai*	*Yamaguchi*
Loss of Support	$200,000	$1,813,391
Loss of Past and Future Services & Inheritance	$0	$115,140
Mental Anguish & Grief of Survivors	$150,000	$526,000
Funeral & Memorial Expenses	$0	$16,500
Pre-death Pain & Suffering of Passenger(s)	$1,500,000	$100,000
*Loss of Society	$300,000	—

*Not actually entered.

Both judges awarded prejudgment interest to Saavedra at the rate of the 52-week Treasury Bill ("T-Bill") as of the last T-Bill auction prior to the judgment.

In both the Okai and Yamaguchi actions, the parties have filed appeals and cross-appeals. Saavedra seeks loss of society damages and a higher award of prejudgment interest, while KAL challenges the amount of damages awarded. Many of the issues raised before this court were resolved for the first time in a recent, related Supreme Court case, *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), an action for damages brought in the Southern District of New York on behalf of another KE007 crash victim. The Supreme Court in *Zicherman* invalidated an award for loss of society, holding that the DOHSA does not authorize nonpecuniary damages. *Id.* at 637. In light of *Zicherman*, we asked for supplemental briefing.

The parties now agree that the district courts' judgments correctly denied Saavedra any recovery for loss of society, and Saavedra's appeals in the Okai cases and cross-appeals in the Yamaguchi case are abandoned to the extent they sought such damages.

KAL further contends that the other district court awards of nonpecuniary damages, which include damages for survivor's grief and the pre-death pain and suffering of the decedents, are invalid in light of *Zicherman*. In the alternative, KAL challenges the sufficiency of the evidence supporting the award of pre-death pain and suffering, as well as the amount of those damages in the Okai cases. Saavedra defends these damages, arguing that they are supported by Korean law and thus are

redressable under DOHSA § 4, 46 U.S.C. § 764 ("rights of actions given by laws of foreign countries"), even if nonpecuniary damages are not otherwise available under DOHSA after *Zicherman*. Saavedra also argues that predeath pain and suffering damages are available as part of a general maritime survival action. Accordingly, we must first determine the effect of the *Zicherman* decision on the district courts' awards of nonpecuniary damages in these cases.

We also must consider the other damage issues. The first is KAL's sufficiency of the evidence challenge to the loss of support damages in the Okai cases. The other is Saavedra's contention that the district court abused its discretion in awarding prejudgment interest at the 52-week T-Bill rate in effect as of the last T-Bill auction prior to judgment, rather than at the higher rate in effect at the last T-Bill auction prior to the KE007 disaster.

[1] We hold that the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims. We do not reach the question of whether claims for damages might also be made under foreign law pursuant to § 4 of DOHSA, 46 U.S.C. § 764, because Saavedra elected to proceed directly under the Warsaw Convention on the theory that the Convention authorizes claims broader than those allowed under DOHSA. Saavedra neither proffered evidence of Korean law at trial nor sought to have the jury instructed on Korean law.

We hold that Saavedra adduced sufficient evidence to support the award of loss of support in the Okai case. Finally, we hold that, given the alternatives presented to the district court, it did not abuse its discretion in awarding prejudgment interest at the 52-week T-Bill rate as of the last T-Bill auction prior to judgment.

THE ZICHERMAN LITIGATION

[2] The parties agree that the Supreme Court's decision in *Zicherman* forecloses Saavedra's claims for loss of society damages in both cases. Saavedra, like the plaintiffs in *Zicherman*, claimed loss of society damages directly under the Warsaw Convention. The parties disagree, however, on whether *Zicherman* forecloses other claims. To help resolve the disagreement over the proper interpretation of the Supreme Court's opinion, we look to the history of the *Zicherman* litigation.

The district court in *Zicherman*, 807 F.Supp. 1073, 1086-89 (S.D.N.Y. 1992), permitted the jury to award loss of society damages, on the ground that such damages were recoverable directly under Article 17 of the Convention, which makes the carrier, here Korean Air Lines, liable for "damage sustained in the event of death or wound of a passenger . . . " 49 Stat. 3018. In the district court's view, "damage sustained" referred to "actual harm experienced," 807 F.Supp. at 1087 (quoting *In re Korean Air Lines Disaster*, 932 F.2d at 1485), so that when a passenger died, actual harm experienced would include "monetary or other loss to the survivors," such as loss of society damages. *Id.* The district court rejected the notion that DOHSA limits the recovery available directly under

the Convention, concluding that to the extent a conflict exists, the Convention, which is more recent, governs. *Id.*

On direct appeal, the Second Circuit agreed that loss of society damages are available under the Warsaw Convention, but not on the same ground as the district court. The Second Circuit explained that "damages under the convention should be determined 'by general maritime law.' " *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 21 (quoting *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 828 (2nd Cir. 1994)). The Second Circuit then concluded that general maritime law allows recovery for loss of society. *Id.*

[3] The Supreme Court reversed. *Zicherman*, 116 S.Ct. 629. First, the Court rejected the district court's theory that damages are recoverable directly under the Warsaw Convention. The Court explained that "damage" in Article 17 refers to "legally cognizable harm," and that adjudicating courts are to determine what harm is legally cognizable only by referring to domestic law. 116 S.Ct. at 634. In *Zicherman*, the parties agreed that the governing domestic law was the United States'.

[4] The Court then rejected the Second Circuit's holding that general maritime law is the proper domestic law to consider. The Court explained that Article 17 is merely a pass through provision that does not permit federal courts "to develop a common law rule – under the cover of general admiralty law or otherwise – that will supersede the normal federal disposition." *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in the absence of the Warsaw Convention." *Id.* In cases of wrongful death on the high

seas, that law is DOHSA. *Id.* Since DOHSA permits only pecuniary damages, loss of society damages are unavailable. *Id.*; 46 U.S.C.App. § 762.

[5] Because the rule in *Zicherman* was applied to the parties in that case, we must give the rule retroactive effect in this case, which was pending when *Zicherman* was decided. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S.Ct. 2439 (1991)(holding that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so"); *Melton v. Moore*, 964 F.2d 880 (9th Cir. 1992). The district court judgments, insofar as they deny damages for loss of society, must be affirmed.

SURVIVOR'S GRIEF

[6] The district court allowed the jury to award damages in each case for survivor's grief, on the ground that such damages are available directly under the Warsaw Convention. In light of *Zicherman*, the district court's theory is no longer tenable. 116 S.Ct. at 634. As the Supreme Court explained, no cause of action directly under the Warsaw Convention exists; the Convention merely provides "pass through" provisions, which allow the courts to use only domestic causes of action. *Id.* at 636. Saavedra is therefore limited to the remedies provided in DOHSA. *Id.* Because DOHSA creates only a cause of action for pecuniary damages suffered by the estate, and the survivor's grief is a nonpecuniary damage, we must hold that the district court erred in permitting Saavedra to proceed on that claim and in awarding judgment upon it.

[7] Saavedra alternatively argues on appeal that although DOHSA generally bars nonpecuniary damages, such damages are available under § 4 of DOHSA, which Saavedra contends allows recovery in this case for damages available under Korean law. Section 4, entitled "Rights of action given by laws of foreign countries" provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. § 764.

Defendants argue that § 4 is essentially a choice of law provision that does not permit a plaintiff to pick and choose among United States and foreign law. Several courts have so interpreted § 4. *See, e.g., Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F.Supp. 594 (S.D.N.Y.1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 814 F.Supp. 592, 599 (E.D. Mich. 1992); *In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F.Supp. 1175, 1185-86 (W.D.Wash. 1982). On the other hand, there are several district court cases permitting claims under foreign law in addition to claims brought under United States statutes. *See, e.g., Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925); *Noel v. Linea Aeropostal Venezolana*, 260

F.Supp. 1002 (S.D.N.Y. 1966); *Heath v. American Sail Training Association*, 644 F.Supp. 1459, 1467 (D.R.I. 1986).

[8] The Supreme Court's decision in *Zicherman* does not address this issue, for the parties in that case agreed that only United States law applied. 116 S.Ct. at 635. We also need not address the issue, as Saavedra failed to properly preserve it. Initially, Judge Hill, in his Order Declaring Applicable Law, held that survivor's grief damages were available pursuant to the Korean law theory that Saavedra now urges. Saavedra, however, had a change of heart and moved the district court to delete any reference to Korean law, and to hold instead that survivor's grief damages were available directly under the Warsaw Convention. Judge Hill granted Saavedra's motion. Thus, no evidence of Korean law was adduced at trial, and the question of survivor's grief damages under a Korean law theory was never put to the jury. Given these facts, we hold that Saavedra failed to preserve this theory in the district court, and it is hence unavailable to her on appeal. *See Moran v. Aetna Life Insurance Co.*, 872 F.2d 296, 300 (9th Cir. 1989)(plaintiff may not assert an alternate theory for defendant's liability for the first time on appeal).

PRE-DEATH PAIN AND SUFFERING

At trial Saavedra introduced evidence to establish that the KE007 victims survived for eleven to twelve minutes after the Soviet missile(s) hit the plane. Saavedra also provided dramatic expert opinions describing how the victims probably suffered, both mentally, because

they were cognizant of their impending deaths, and physically, because altitude decompression causes the gases trapped inside the body to try to escape.

[9] The district court held that Saavedra was "entitled to assert a survival claim for decedents' pre-death pain and suffering, based [directly] on Article 17 of the Warsaw Convention." But, just as survivor's grief and loss of society damages are unavailable directly under the Convention, the same is true for pain and suffering. The Convention simply does not create a substantive cause of action, and the contrary view, adopted by the District Court in *Zicherman* as well as the district court here, has been squarely rejected. 116 S.Ct. at 631. Saavedra must turn to DOHSA, but that statute simply will not brook pain and suffering relief. First, pain and suffering is nonpecuniary and DOHSA allows recovery only for pecuniary harm. 46 U.S.C. § 762. Second, DOHSA authorizes a wrongful death action on behalf of the decedents' immediate family and dependent relatives, 46 U.S.C. § 761; whereas pre-death pain and suffering damages are generally brought as part of a survival action on behalf of the decedent. *See generally, Evich v. Morris*, 819 F.2d 256, 258 (9th Cir.)(*"Evich II"*) (pre-death pain and suffering generally recoverable as part of survival action), *cert. denied*, 484 U.S. 914 (1987), *implied overruling in part recognized by, Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426, 430 (9th Cir. 1994).

[10] Saavedra, recognizing that these damages are not ordinarily available under the Warsaw Convention and DOHSA, attempts to defend the award on two grounds. The first is the same as that asserted with respect to survivor's grief, namely that a claim for such

damages is recognized under Korean law. The record indicates, however, that Saavedra never advanced this Korean law theory in support of pre-death pain and suffering damages to the district court. Further, Saavedra never adduced evidence at trial of what these damages would be under Korean law, and never put the question to the jury. Because the record with respect to pre-death pain and suffering is materially the same as that with respect to survivor's grief, Saavedra's Korean law argument must be rejected for the same reasons. *Moran*, 872 F.2d at 300.

[11] Second, Saavedra contends that a decedent's estate can bring a survival claim for pre-death pain and suffering under general maritime law, even though that cause of action is unavailable under DOHSA. Saavedra points out that in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 90 S.Ct. 1772 (1970), the Supreme Court held that DOHSA may be supplemented by general maritime law. "The Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Id.* at 1775. *Moragne* arose out of the death of a longshoreman on a ship. The Court allowed the longshoreman's widow to bring a general maritime wrongful death action, asserting the unseaworthiness of the vessel, despite the fact that DOHSA did not cover the decedent's particular situation.

[12] This court held, following *Moragne*, that DOHSA may be supplemented with a survival action under general maritime law, *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985)("*Evich I*"), and we noted that

such survival actions have generally allowed compensation for pre-death pain and suffering. Evich II, 819 F.2d at 256. We also said that the decedent's future earnings were compensable in such an action. *Id.* Saavedra relies on these cases.

[13] If *Evich I* and *Evich II* were the only relevant precedents, Saavedra's argument for pre-death pain and suffering damages would be persuasive; however, several subsequent Supreme Court decisions, culminating with *Zicherman*, undoubtedly preclude such relief. The first is *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978), where the Court held that because DOHSA bars nonpecuniary damages, DOHSA may not be supplemented with a general maritime wrongful death action for nonpecuniary damages, specifically loss of society damages. The Court explained that "when [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 625, 98 S.Ct. at 2015. The Court applied similar logic in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34-36, 111 S.Ct. 317, 326-328 (1990), holding that since the survival action created by the Jones Act bars recovery for loss of future earnings, a supplemental survival action under general maritime law, allowing recovery for loss of future earnings, is impermissible. Miles therefore overruled *Evich II*, insofar as *Evich II* allowed a general maritime survival action for loss of future earnings. *Davis*, 27 F.3d at 430. Finally, in *Zicherman*, the Court rejected the view, adopted by the Second Circuit, that general maritime law ordinarily governs domestic actions brought under the Warsaw Convention, stressing that the Warsaw Convention does not

"empower [the courts] to develop some common law rule – under general admiralty law or otherwise – that will supersede the normal federal disposition."

[14] We are therefore compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot 'supplement' Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here. Saavedra notes that the Court in *Zicherman* specifically left open the question of whether an award of pain and suffering damages was permissible; however, the Court declined to address pain and suffering only because that award was not challenged on petition for certiorari. 116 S.Ct. at 636 n. 4. The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction. The Sixth Circuit addressed this very issue in *Bickel v. Korean Air Lines Co., Ltd.*, 83 F.3d 127, 132 (6th Cir. 1996), and came to the same conclusion:

> As to the recoverability of survivor's grief damages under DOHSA, we note that the Supreme Court did not directly address this issue. We cannot, however, perceive any distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not.

We agree with the Sixth Circuit and decline Saavedra's invitation to circumvent Congressional wisdom by allowing damages that DOHSA precludes.

LOSS OF SUPPORT

In the Okai appeal, KAL contends that the district court erred by failing to set aside the loss of support damages awarded to the Okais' parents. This court will not disturb a jury verdict supported by substantial evidence. *Davis v. Mason County*, 927 F.2d 1473, 1486 (9th Cir.), *cert. denied*, 502 U.S. 899 (1991).

KAL first contends that Saavedra adduced no evidence that the Okais' parents had a reasonable expectation of future financial support. *See Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987)("recovery for loss of support requires some showing of dependence on the deceased or an expectation of support"), *cert. denied*, 493 U.S. 871 (1989). This contention lacks merit. Makoto Okai's father and Yoko Okai's mother both testified that as they aged, they would expect support from their children. Moreover, Saavedra solicited testimony from a cultural anthropologist, who agreed that in Japanese culture, the Okais' parents could reasonably expect support from the Okais.

[15] KAL also takes issue with the manner in which Saavedra's expert economist calculated the Okais' future earnings. Specifically, the economist calculated Makoto Okai's future earnings from statistics for college graduates, since no statistics for Makoto Okai's actual profession – jazz musician in Japan – were available. The economist also admitted that he did not take the Okais'

personal consumption into account when calculating future earnings. These perceived weaknesses do not render the economist's testimony meaningless. The arguments KAL now makes were presented to the jury, and we are not permitted to weigh the evidence again, or to substitute our own judgment for the jury's. *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992). On this record, substantial evidence supports the jury award.

INTEREST

Saavedra argues that the district court erred by setting prejudgment interest at the 52-week T-Bill rate in effect just before judgment, rather than at the higher rate available right before the KE007 disaster. We review a district court's decision to assess prejudgment interest rates for abuse of discretion. *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790 (9th Cir. 1986).

[16] Saavedra contends, correctly, that prejudgment interest is a compensatory measure. *Western Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1288-89 (9th Cir. 1984). Saavedra is incorrect, however, that the district court was required to choose the higher interest rate at the date of the crash in order to achieve adequate compensation. The most accurate way to fully compensate a plaintiff would be to award prejudgment interest from the date of injury, but at a fluctuating rate. *See generally, MHC, Inc. v. Oregon Dep't of Revenue*, 66 F.3d 1082, 1090-91, n. 10, n. 11 (applying fluctuating T-Bill rate, calculated daily from date obligation was due). None of the parties presented this option to the district court.

Instead, Saavedra argued for T-Bill rate just before the time of injury, while KAL argued for the T-Bill rate just before the time of judgment. We find that the district court, presented with these choices, did not abuse its discretion.

Indeed, the district court's decision is consistent with 28 U.S.C. § 1961(a), which states that post-judgment interest should be set at the T-Bill rate "settled immediately prior to the date of judgment." Although this section governs post-judgment interest, this court has applied its presumption in favor of using T-Bill rates in the context of prejudgment interest. *See, e.g., In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990). As we have previously used § 1961(a) as a yardstick for prejudgment interest, we would be remiss to hold that the district court abused its discretion in following the dictates of § 1961(a).

CONCLUSION

We therefore VACATE the award of damages for survivor's grief and pre-death pain and suffering of the passengers. We AFFIRM the award of loss of support damages, the district court's refusal to grant loss of society damages, and the district court's order awarding prejudgment interest at the T-Bill rate just prior to judgment.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY S. SAAVEDRA; The Estate of MASAKAZU YAMAGUCHI; MAKIKO YAMAGUCHI; CHISATO YAMAGUCHI, et al., Plaintiffs-Appellees/ Cross-Appellants, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellant/ Cross-Appellee.	Nos. 94-55018 94-55060 94-55161 DC No. CV-84-09324-IH (JRx) (Central California)
KIMBERLY S. SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Personal Representative of TORU OKAI and HITOKO OKAI, Plaintiff-Appellant/ Cross-Appellee, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellee/ Cross-Appellant.	Nos. 94-55495 94-55496 DC No. CV-84-09329-AWT ORDER (Filed Sept. 9, 1996)

BEFORE: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.